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ABSTRACT

This document is the fourth in a series of studies designed to examine the legal aspects of various potential educational problems in our society. This particular study deals with the case of a private university in New York State that sues the State University of New York for exceeding its statutory authority. The private school accuses SUNY, in particular, of developing programs that already were offered at the private institution, thus attracting students away from the private school, wasting state funds on duplicated programs, and adding to the financial burden of the private school. Ninety percent of the attorneys surveyed were of the opinion that such a case could appear in the courts within 5 years; 95% believed that private colleges are a must for our society; and 80% see the event as reported as being threatening to society. Some of the implications that such an event might have for the future of higher education are: (1) the State would subsidize the private educational institutions; (2) a collectivist curriculum would develop in which the public institutions would be allowed to offer only what the private institutions do not; and (3) the expansion of a universal higher education system would be hampered. (HS)

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Emerging Education Policy Issues In Law

PUBLIC–PRIVATE COMPETITION IN HIGHER EDUCATION

number four of a series

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by
stuart a. sandow
research fellow

an exploratory report from the
educational policy research center at syracuse
syracuse university research corporation

July 1971

1

THE EDUCATIONAL POLICY RESEARCH CENTER AT SYRACUSE:

The EPRC was founded in 1967 with funds provided by the U.S. Office of Education on an annual basis. Its purpose is to define and assess alternative policies for education with an emphasis on the future consequences of present policy options. Three major research projects are post-secondary education alternatives, K-12 alternatives, and long-term policy planning. The Center was established in cooperation with the School of Education and the Maxwell Graduate School of Citizenship and Public Affairs of Syracuse University, and is administered by the Syracuse University Research Corporation. The Center consists of about twenty researchers, drawn from governmental and educational organizations, and from professors and graduate students at Syracuse University. Its focus on the future of education has required the Center to employ both traditional and new research tools, and to draw upon a wide range of experience and training in practical affairs and academic disciplines. The Center's emphasis on policy research has led to an expanding dialogue between its staff and the authorities and public of education in order to relate its policy analysis to problems in educational policy formulation and planning.

Documents are available from the Educational Policy Research Center at Syracuse in three formats, besides the regular publication, Notes on the Future of Education:

RESEARCH REPORTS

Reports which have completed review by the EPRC and which deal with specific, policy oriented research. The reports in this series are usually marked by intensive research, either quantified or historical, and address themselves to specific research questions.

EXPLORATORY REPORTS

Reports which, while dealing with policy issues, often approach the realm of conjecture; they address themselves to social issues and the future, may be prescriptive rather than descriptive in tone, and are, by nature, more controversial in their conclusions. The review of these reports by the EPRC is as rigorous as that for Research Reports, though the conclusions remain those of the researcher rather than necessarily representing consensus agreement among the entire Center staff.

WORKING DRAFTS

Working Drafts are papers in progress, and are occasionally made available, in limited supply, to portions of the public to allow critical feedback and review. They have gone through little or no organized review at the Center, and their substance could reflect either of the above two categories of reports.

Emerging Education Policy Issues in Law

PUBLIC-PRIVATE COMPETITION IN HIGHER EDUCATION

(Number Four of a Series)

by

Stuart A. Sandow

July 1971

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THE SUBJECT OF THIS REPORT IS A

FUTURE NEWS EVENT

STATE UNIVERSITY FOUND NEGLIGENT !!!

guilty of exceeding statutory authority

ALBANY (SURC) ---- A New York State Supreme Court judge in Albany ruled today that the State University of New York had clearly exceeded its statutory authority under the New York Education Law, by offering curricula in excess of public demand at the expense of private institutions, and that their activities bordered on negligence. Judge S. B. Schroeder's ruling, directed to SUNY's Board of Trustees, ordered an immediate end to any curriculum currently offered which placed the state-supported campuses in direct competition with private colleges and universities where no real need exists.

The action was brought in September by Jefferson University, a medium-sized undergraduate and graduate private institution, after its governing board determined that decreasing applications and enrollment were directly related to competition by the State University. The suit charged that the State University now offered curricula already available at JU with a significant tuition differential.

Jefferson officials, who announced in the Fall of 1970 that the school was near bankruptcy, contended in their suit that the State University was "clearly exceeding its statutory authority as set forth in the Education Law of New York by constructing facilities for higher education without full evaluation of the already existing private services." They further charged that the State University had behaved negligently, in offering curricula which were already available in private institutions.

The Judge's ruling went on to say that "the private universities have behaved in many ways as a utility, and the public institutions might act in a like fashion.

"The time has come to reappraise the role and function of the state university system," he continued. "Since 1948 this state has invested untold sums of taxpayers money in creating one of the finest systems of higher education in the country. If that system, through poor planning and bureaucratic entrenchment, misuses its discretionary powers to cause the ruin of institutions long supported by the private sector, no good end is served. The legislative mandate to the university's trustees was intended to meet a demand which has not materialized as expected. The over-extension of the state university complex clearly jeopardizes the very existence of certain private institutions. For the state system to remain the finest, there must be a comparison with the excellence of other institutions. If, however inadvertently, the state system becomes an instrument for the destruction of private education, this balance will be irretrievably lost."

Judge Schroeder added "that the many questions raised in the proceedings will undoubtedly demand address in the future." Counsel for the State University Board of Trustees would not comment on any plans for an appeal.

TABLE OF CONTENTS

	Page
Future News Event	a
Introduction to the Series	1
Purpose of the Series	2
The Inquiry	7
The Study Materials	11
Introduction to Responses	19
Major Conclusions and Representative Edited Responses	20
Comment.	29

Appendices:

I.	Disaggregated Edited Responses	33
II.	List of Respondents	61
III.	Future News Events	64

Work in Progress.	67
Information and Order Form	67

Note: The back cover details other cases in the series for easy reference.

INTRODUCTION TO THE SERIES

The Educational Policy Research Center at Syracuse has, in the past four years, developed material that helps clarify and place in perspective emerging issues that face the United States and are the concerns of this decade. The Center works to identify the dimensions of change in the many sectors of society and the impact of those changing realities on education.

This series attempts to translate Center research topics into specific legal issues that are worthy of exploration--issues that point up inequities in service or reveal policy alternatives, and to examine them with new methodologies developed at the Center.

One of the prime forces of social modification and change has been the effect of precedent case law. The events in this series act to focus attention on emerging issues and through them, deliver reasonable alternatives for policy at the state and federal level. Many of the issues in this series do not belong in the courts. They are the concerns of the legislature. But often, citizens demand action faster than can be met through the political arena. The cases and the analysis of them help speed the process of identification and hopefully redirect our federal policy agendas.

What follows is the fourth inquiry in a series with a selected number of attorneys attentive to the future of education on a national level. The focus may have profound implications for education through the modification of policy agendas for tomorrow.

The case: A private university in New York State sues the State University of New York for exceeding its statutory authority.

THE COMPANION DOCUMENT IS CASE #3 IN THE SERIES AVAILABLE JUNE '71, *UNEQUAL STUDENT AID.*

PURPOSE OF THE SERIES

I have chosen the judicial system as a staging area--a theater--that allows one man to argue against the past and interpret his present in such a way as to demand legislative .eview and, where necessary, action.

I have cnosen this strategy for the following reasons. There are emerging in our society precedent cases that, successfully pursued through the courts, set the stage for still more change. These precedent cases can be conjectured about in the present to describe the probable and plausible actions that can be set in motion by further decisions. These can and should be studied as a resource for policy-makers.

Elective offices at all levels of political s'stems in the United States are for the most part filled with men whose formal educational experience includes some background in law. Legislators define the parameters of acceptable growth and change for society by legislating certain activities and acceptable modes of behavior for the society. This point cannot be overlooked in discussions about policy and decision-making which affect the future.

The rhetoric of futures-thinkers has as one of its basic tenets that the future is filled with alternatives. It is held that we can describe the future we see as an acceptable alternative to today and can plan for its occurrence by striving for certain ends to the deliberate exclusion of others. This assumes that no alternative is necessary; rather, all alternatives are possible and policy can be designed to make them more probable. They may fill the spectrum from good to bad, but each is in turn sufficient as an acceptable future--each an alternative to the present.

To describe alternative futures one conjectures a state of affairs different than today. After locating that future in the continuum of time, past-to-future, one can describe the hypothetical minimum sufficient changes

that must occur in order for the specified alternative future to occur. In effect, a series of "if . . . then" propositions. By conjecture, we mean that men describe emerging new relationships that might never have occurred in the past, in such a way as to demonstrate the plausibility of a future that is new or decidedly different than we have ever known. Conjecture is a leaping into the unknown with a tracing of strategic routes (or plans) in order to describe how a specified future could come to be.

But whem men analyze the past to demonstrate how things came to be, they do not conjecture, in this sense. Conjecture is intuitive and deals with the behaviors of men sufficient to reach an un-occurred future; extrapolation is reflective and deals with behaviors which once were really only sufficient, but have come to be seen as necessary by the very fact of their having occurred.

The law does not conjecture; rather, it emphasizes the non-alternative past. The law draws its strength and power from the continuance of our past traditions into the future. Forecasting the future by describing analogies from the past excludes the impact of individual human beings on the lives of men, and treats all men as constant through time, holding similar--never changing--beliefs, values, morals, and needs. What is addressed here is the mind set that describes emerging futures in terms inconsistent with the rhetoric of alternative futures. The prescriptive power of law is not addressed.

The law is steeped in the past through the emerging history of cases. It depends on the continuance of belief in the meaning of right and wrong. But changes do occur. They occur regularly through various precedents. Often these precedent setting cases are referred to as landmark decisions. What are landmark decisions or precedents? They are nothing more than sufficient alternative ways of describing the meaning of our world so that all that has come before is no longer necessarily correct. Further, they are the conjectures of one man representing another who believes there is an alternative sufficient argument to substantiate his view.

Precedential cases change the shape and meaning of the society. They are as revolutionary in their long-range effects as are the actions of mobs and social class upheavals; but they have a unique distinction that should not be lost in this discussion. Precedent setting cases are always actions of "one man vs. the past"--one man having an alternative sufficient perception of the meaning of his world. In the United States alone, people like Escobedo, Brown, King, etc., coupled with the actions of their counsel, describe to a world a state of affairs where their actions demand reassessment and are heard first in court, then throughout the land. De Toqueville argued that mass movements follow the actions for change initiated within a government, not its inverse. It would appear that any decision of a court is not necessary, only sufficient. But over time these decisions, by repetition, come to be treated as necessary.

Every profession that continues through time develops habits. Habits are hard to break. The actions that comprise the habit come to be seen as necessary ways of behaving, thinking, or acting. We try to break habits when we conjecture about the future. Education in our society is a habit. But educational modes and styles change daily.

The major upheavals in societies today are in many ways directly linked to education--a process not controlled by those who experience it, nor experienced by those who control it. The youth of today are crying out with descriptions of alternative sufficient strategies of preparing themselves for the future and are met on every side by the strategies drawn from the past that are thought to be necessary, imposed on them by the educating system. Both want the young to learn.

- Is the strategy so important that the goal must suffer?
- Is there a necessary way to learn?
- Is our society capable of perceiving alternatives?
- Cannot precedents be set for a change process that is non-revolutionary and allows the disaffected to input into the strategies for learning?

It is an exciting prospect to hope that an idea as simplistic as the iteration of future conjectured goals in the past tense might be a significant way of breaking the mind set of causal links between past and future, at the same time breaking down the habits that lead to an inability to deal with the true possibilities of alternative futures.

THE INQUIRY

"There are two questions at issue: whether the benefits arising out of the (higher) educational process are essentially social and public, or whether they are essentially personal and private; and, if and to the extent that they are social, whether they are essentially local or regional, or whether they are essentially general or national.

It is safe to say that there are both private and public elements, and both local and national aspects of the public elements, in almost any educational process. To justify a significant federal involvement requires a significant degree of public and national concern and benefit. A test of publicness and nationalness is needed.

An educational activity should be a candidate for public funding if and to the extent that it (1) creates non-exclusive capacities; (2) provides for equal access; and (3) is publicly accountable."

I would strongly urge any reader concerned with this area to request a copy of the paper, The "Financial Crisis" in Higher Education: Past, Present, and Future, by James C. Byrnes and A. Dale Tussing, June 1971, 30 pp., with particular attention to pp. 22-30, "The Federal Responsibility.

Questions and Policy Issues

- What is the function of non-compulsory higher education: to serve the felt needs of society or the felt needs of individual members of that society?

- Where compulsory attendance is not mandated in either twelfth or thirteenth grade, how do they differ in terms of public support?

- What political unit of government if any should support higher education and to what degree?

- What benefits would accrue to society if everyone/none were supported in higher education?

- On what grounds does the State enter and compete with the private sector?

- Is the State exceeding its mandate today?

- Is the State University abusing its discretionary powers?

- What is the purpose of the publicly supported higher education system?

Background Reading

The research in progress of the following staff of the Educational Policy Research Center at Syracuse that helped shape the broader questions dealt with here are listed below and these documents are available from the Center.

James C. Byrnes and A. Dale Tussing. The "Financial Crisis" in Higher Education: Past, Present, and Future. Prepared for the U.S. Office of Education. Syracuse, N.Y.: Educational Policy Research Center, June 1971.

Thomas F. Green. Education and Schooling in Post-Industrial America. Some Direction for Policy. Presented to the Committee on Science and Astronautics, U.S. House of Representatives, Ninety-First Congress, Second Session, January 28, 1970. Washington: U.S. Government Printing Office, 1970.

Michael Marien. "External Credit and Internal Discredit: Intertwining Developments That May Revolutionize Higher Education." Working Draft. Syracuse, N.Y.: Educational Policy Research Center, January 1971.

Laurence B. DeWitt. "More Universal Higher Education ahd the Continuing Problem of Equal Opportunity." EPRC Working Draft, December 1970. In Essays in Educational Policy Analysis, W. L. Ziegler, ed., Fall 1971.

Thomas F. Green and A. Dale Tussing. "An Analysis of Disaffection With and Conflict in the Schools." EPRC Working Draft, December 1970. In Essays in Educational Policy Analysis, W. L. Ziegler, ed., Fall 1971.

Stuart A. Sandow. "The Pedagogy of Planning: Defining Sufficient Futures." To be published in Futures: The Journal of Forecasting and Planning, September 1971.

Warren L. Ziegler. "The Future as Metaphor." In Notes on the Future of Education, a Publication of the Educational Policy Research Center at Syracuse, Vol. 2, Issue 2, Spring 1971.

Warren L. Ziegler, ed. Essays in Educational Policy Analysis. Six essays by EPRC staff members discussing Financing Higher Education, Social Selection Procedures, Equal Opportunity, Disaffection in the Schools, K-12 Policy Changes. Available Fall 1971. 100 pp. $2.50.

THE STUDY MATERIALS

A. Letter

Pages 13-14

B. Background Material

(Summary of Points Made in Brief)

Page 15

C. News Event

Page 16

D. Questions Addressed to Respondents

Page 17

A.

SURC Educational Policy Research Center at Syracuse

April 5, 1971

Dear Sir:

One of the prime forces of social modification and change in this country has been the effect of precedent case law. As a research group performing policy research for the United States Office of Education, we are concerned with the implications of actions in law for education.

Much of the Syracuse EPRC's work is directed toward the implications of policy for the long term future. These "forecasts" are not an end in themselves; rather, they become valuable inputs into a process designed to supply policy-makers with reasonable alternatives which will aid policy-making and planning at the federal level. Similarly, the events themselves act to focus attention on emerging issues and hopefully contribute to the changing policy agendas of the United States.

This letter concerns the third case in a series we are preparing. The first issue in the series dealt with the implications of a successful suit charging fraud against a school board. The concerns of the report helped focus attention on the pressing problems of accountability in education and the increasing number of performance contracts being let in the United States. The second issue dealt with a problem emerging out of our complex society--namely, career obsolescence in a post-industrial society.

This, the third case concerns a major issue in post-secondary education: the nature of public support--who benefits and to what end. We are asking you to consider the implications of a hypothetical court case that might arise and impact on the future of education.

We have enclosed Background Material, which we hope will serve to set a stage for the event in question. With it is a FUTURE "NEWS EVENT" detailing the minimum information of a successful court case. You are being asked to treat it as if it had already occurred while addressing each of the enclosed questions.

The news event concerning the case is stated in such a way as to help you deal with it as an occurred event rather than as improbable and not worthy of discussion. Many things that "could never happen" happen. We ask that you be as precise or as conjectural in your responses to the questions on the cards as you like.

You have been asked to participate in this exercise because of your past work and concern in the joint fields of law and education. Please return the response cards within two weeks from your receipt of this letter. You will receive a copy of the final report of this effort as soon as it has been prepared (usually two months).

Several populations are being addressed in the inquiry:

Chief State School Officers
Chancellors and Presidents of Colleges and Universities
Legislators in State and Federal Office
House Counsel for Major Corporations in Education
Deans of Law Schools
Law Review Editors
Experts in the Field of Post-Secondary Education
Private Practicing Attorneys
Counsel for Relevant Agencies

While all individual responses will be treated anonymously in the report, we would like to include a list of respondnets. If, for any reason, you would prefer to have your name deleted from this list, please inform us of this when you return your questionnaire. If you have not received a copy of the earlier reports in this series, and would like to, please note this on the last card.

If you are unable to respond personally, please ask an appropriate colleague to respond for you or in his own right, noting his name and title as respondent.

Thank you for the time and attention you devote to this project, and for your concern for the future problems facing education in the United States.

Sincerely,

Stuart A. Sandow, Ph.D.
Educational Policy
Research Center/Syracuse

SAS/plb
Enclosures

B.

Background Material

Summary of Points Made in Brief

Point: The public education system in the United States has grown on the average, one (1) year every two (2) decades. The system today awards a twelfth grade degree to 80% of all 18 year olds.

Point: Coincident with this growth, compulsory attendance in the school system has been mandated to an ever-increasing level.

Point: The post-secondary system (College & University) developed first in the private sector.

Point: To this date there is no compulsory attendance beyond the twelfth grade in the United States.

Point: Public post-secondary education began with a need to produce agriculturally and technically skilled individuals and expanded its service to include the preparation of teachers for the ever-expanding elementary and secondary system.

Point: The era following World War II experienced tremendous growth in public higher education to relieve the temporary burden of demand placed on the private universities and to prepare space for the assumed continuous growth of population.

Point: Massive public expenditures to support public offerings in Liberal Arts is only two decades old.

Point: The State has chosen to meet the demand of individuals for higher education by the expansion of its own physical plant.

Point: The State has developed an extensive Junior College system that acts to raise expectations of students and offers entrance to the post-secondary system at a price that is seriously less than that charged by the private institutions.

SURC Educational Policy Research Center at Syracuse

C.

FUTURE NEWS EVENT

STATE UNIVERSITY FOUND NEGLIGENT !!!

guilty of exceeding statutory authority

ALBANY (SURC) ---- A New York State Supreme Court judge in Albany ruled today that the State University of New York had clearly exceeded its statutory authority under the New York Education Law, by offering curricula in excess of public demand at the expense of private institutions, and that their activities bordered on negligence. Judge S. B. Schroeder's ruling, directed to SUNY's Board of Trustees, ordered an immediate end to any curriculum currently offered which placed the state-supported campuses in direct competition with private colleges and universities where no real need exists.

The action was brought in September by Jefferson University, a medium-sized undergraduate and graduate private institution, after its governing board determined that decreasing applications and enrollment were directly related to competition by the State University. The suit charged that the State University now offered curricula already available at JU with a significant tuition differential.

Jefferson officials, who announced in the Fall of 1970 that the school was near bankruptcy, contended in their suit that the State University was "clearly exceeding its statutory authority as set forth in the Education Law of New York by constructing facilities for higher education without full evaluation of the already existing private services." They further charged that the State University had behaved negligently, in offering curricula which were already available in private institutions.

The Judge's ruling went on to say that "the private universities have behaved in many ways as a utility, and the public institutions might act in a like fashion.

"The time has come to reappraise the role and function of the state university system," he continued. "Since 1948 this state has invested untold sums of taxpayers money in creating one of the finest systems of higher education in the country. If that system, through poor planning and bureaucratic entrenchment, misuses its discretionary powers to cause the ruin of institutions long supported by the private sector, no good end is served. The legislative mandate to the university's trustees was intended to meet a demand which has not materialized as expected. The over-extension of the state university complex clearly jeopardizes the very existence of certain private institutions. For the state system to remain the finest, there must be a comparison with the excellence of other institutions. If, however inadvertently, the state system becomes an instrument for the destruction of private education, this balance will be irretrievably lost."

Judge Schroeder added "that the many questions raised in the proceedings will undoubtedly demand address in the future." Counsel for the State University Board of Trustees would not comment on any plans for an appeal.

D.

Questions Addressed to Respondents

1. What is the earliest possible date for the case reported here to emerge in a State Court?

2. If you were preparing the plaintiff's case, how might you argue?

3. If you were preparing the defense, how might you argue?

4. Other causes of action that might arise from the success of this action are...?

5. What suggestions would you make to the legislature to prevent the action occurring, forestall, or nullify the action?

6. How might the State act to satisfy the court order?

7. From your knowledge base, what implications do you see a case of this type having on the future of higher education in this country?

8. If the case were reversed on appeal, what would you suggest the private universities do?

9. Do you feel private universities should continue to exist? Would it matter? What would it mean if they didn't?

10. If you see the event as beneficial to society, what lines of approach might legislators/educators/interested publics do to bring about the occurrence of the benefits sooner than you conjectured above? If you see the event as threatening to society, what lines of approach might be brought to bear to forestall the event?

11. I understand that my responses will be treated anonymously.

    I (am, am not) willing to have my name mentioned as a respondent to this inquiry.

    I (would, would not) be willing to act as a respondent in further studies in this series.

    I (would, would not) like to receive a copy of the earlier reports in the series: FRAUD, SOCIAL SECURITY FOR OBSOLETE EDUCATION, and/or UNEQUAL STUDENT AID.

INTRODUCTION TO RESPONSES

- The major conclusions outlined on the following page in no way are intended to replace for the reader the discrete and reasoned positions and arguments that follow. They are merely intended to capsulize positions. They do not reflect the lucid and articulate divergent opinions suggested by respondents.

- The inquiry and the major conclusions do not represent any attempt at delivering consensus. I firmly believe in the efficacy of human deliberation and to that end the most important material in this document is in the array. It is left to the reader who turns to this report for background and ideas on the problem to pick from the array those bits and pieces he chooses to believe and take guidance from.

- This approach to the delivery of information is imperative in that it allows the sustained divergence of opinion until it is necessary to choose.

- 100 individuals were invited to respond.

- 26 responded by May 5th, 4 weeks after the mailing.

- Of the respondents, 15 were willing to be identified.

MAJOR CONCLUSIONS AND REPRESENTATIVE EDITED RESPONSES

1. 90% felt the case could occur within 5 years if at all

The factual predicate for the "Future News Event" and for the judicial determination related in it arguably exists right now--i.e., direct competition; decreasing applications and enrollments in many "private" educational institutions; substantial tuition differentials; and the near bankruptcy of many "private" colleges and universities. Arguable, therefore, by filing an action right now with a court judicially disposed to reach the result set forth in it, the "Future News Event" could emerge today.

Attorney

1971 . . . if no such case has yet emerged.

University Official

This is not considered to be a likely case to occur since the strategies of the private colleges and universities to achieve a competitive position with the public sector point toward requests for support rather than court action.

State Education Official

I am a little uncertain about the wording of this question. The word "emerge is customarily used in the sense "to depart from." However, it would appear that perhaps in this question it is used in the sense of "appearing in." If this is true, then, of course, such a case could be filed in most states at any time by any person claiming an interest therein. If by the question an estimate or guess on the part of the answerer is solicited as to the earliest possible date when such a case might be filed in the State Court, then this answerer does not feel qualified to make such an answer to such a question.

Education Counsel

2. Arguments for the plaintiff included: denial of Equal Proection, misuse of funds, overwhelming power of public funds, lack of Due Process, inverse condemnations, public nature of private institutions

The State's primary obligation is to furnish a complete education to all State residents through the secondary schools (12th grade). This obligation has yet to be fulfilled, and until sufficient funds have been furnished to fulfill that obligation, the State cannot divert funds to this purpose.

The post-secondary system denies equal protection to the State's citizens in that enrollment is not open to all; hence, the expenditure is for a limited class and unconstitutional. State funds are spent for the benefit of non-residents to the detriment of residents who: 1) Because of misdirection of funds are not receiving a complete high school education; and 2) Are denied admission to the post-secondary system. While the State might expend funds to train teachers and others for posts in the State service, it has no constitutional right to expend funds for the general post-secondary education of those who will not enter State service or even remain as State residents.

Attorney

(a) Taking property without due process of law, (b) Equal Protection clause of 14th Amendment.

Dean Law School

That preservation of the private institutions of higher learning is vital to the public good. That for many years the State did, in effect, encourage the establishment of private institutions of higher education, by not expanding its own system of higher education beyond the normal demand. That expansion of the public system of higher education jeopardizes the existence of the private schools and thereby threatens the overall public good. Elimination of the private schools would deprive the public system of an important guideline of excellence.

Education Counsel

The existence of duplicate curricular offerings places an unfair burden on both the private institution and the society at large because of a misallocation of economic resources. The State university system is working toward a monopoly position by subsidized, competitive practices. The government should be providing services only in those areas where the need is not being met by private institutions.

State Education Official

3. Arguments for the defense included: constitutional right; competition is no bar; prior establishment invalid argument; power of State

That ample competition to insure a high level of performance exists among different public educational institutions within the same state. Support and concern for the "private" college alternative therefore need not continue. Private colleges already receive a substantial portion of their operating funds from public revenues (grants, etc.), and even with this they have been unable to withstand the competition of the market place. Private colleges and universities have not

evidenced any willingness to accept the public controls which would go with more public funds. Finally, private colleges for the most part are corporations chartered by the State--which fulfilled their charter purpose decades ago, and those purposes no longer are relevant.

Attorney

Private education will always exist in some form and should "fend for itself," therefore, the State may in effect ignore it and carry on as the State feels is best. - The State is in the best position to know what type of education is needed by members of society for both the present and the forecasted future and can adapt most rapidly to meet these needs. This close relationship between identified educational needs and providing the necessary edu-ational services is actually the most efficient use of any funds spent on higher education. The private system of higher education is inherentingly wasteful because it lacks unified direction.

University Counsel

Since the defense accepts plaintiff's plea of the public nature of "private" institutions, it follows that such institutions are creatures of the State and subject to control of the State. One means of control is to create parallel institutions. The argument is that the State has the power to create and destroy institutions for the convenience and necessity of the public and therefore the private institution has no cause for action.

University Official

4. Other courses of action suggested by this case are: actions for loss of tuition revenues; other public service institutions--hospitals, etc., challenged; increased State control of all higher education

(1) Action by less wealthy students or their parents for an order requiring admission of such students to private colleges at a price they are able to afford. (2) Action by students or taxpayers requiring State controls to insure that private college offerings--for which there is no competition--are provided at a high level of competence and performance.

Attorney

The success of this action would seem to endanger the eventual control of private institutions. It does not seem possible that governments could remain out of the educational picture for any length of time.

We might expect similar actions to be taken in the case of the profession of medical services (public versus private hospitals), community colleges, vocational-technical schools, and vocational offerings in high schools since these are competing proprietary institutions.

State Education Official

5. Suggestions to the legislature include: tuition grants to institutions based on need; equitable distribution of monies for poor; tuition grants to students; creation of a regulatory agency for curricula in the State; tuition differential

Prevent--increase State funds to private colleges; nullify-- withdraw charters from private colleges, and make higher education a State function.

Attorney

Legislation should be provided to grant authority to a regulatory agency for the purpose of requiring the demonstration of need before new programs, courses of study or curricula are introduced in State institutions. The legislature should appropriate funds and provide a legal mandate for the subsidization of students attending private institutions to the degree that the private institution can not compete economically with the public program. Such legislation should include a maximum so that some degree of control could reside in the hands of the determiners of public policy since they do not exercise budgetary control over private institutions. There is considerable precedent for subsidization in the case of transportation, agriculture, exploitation of natural resources, and other activities determined vital to the public good.

State Education Official

The legislature might adopt a policy position that the role of the State University is to complement existing educational services and resources and not to overlap, and then empower the Education Department or the Board of Regents to maintain statistics as to where the private colleges are meeting the demands and where they are not. Then the policy should be to avoid or make appropriate plans for any large scale efforts on the part of the State University to move into these areas.

University Counsel

6. Suggestions to the State to meet order: mandate higher education to increase demand; annual review board of course offerings in State

The order would be reversed on appeal; if not, and if the order is in any way based upon inadequate statutory authority, the Legislature should amend.

Attorney

The State should seek to transfer to the private colleges those areas affected bh the court decision. It could also announce its new policy of non-competition and counsel anyone inquiring of the State University about the areas affected where he or she might find such areas being served among the private colleges of the State. In the long run, the best solution would be for the State and private universities to enter into a cooperative system where each would contribute what was best of each to the total educational resources of the State. Cornell University offers a model of how private and public systems can work as a harmonious team being extremely mutually supportive.

University Counsel

Slowly.

University Official

Under this court ruling, the State would have to show in the future that any course offerings in State universities were supplemental to those offered by the private schools, and were offered primarily to meet a demand not fulfilled by the private schools. It would have to set up a special study program to show each year the extent of the demand for higher education, how much of this demand could be met by private schools already in existence, and then gear the public university system to meet the excess demand.

Education Counsel

7. Implications for the future: State subsidy for all higher education; emergence of a collectivist curriculum; fragmentation; hamper expansion

None.

Attorney

Assuming such a decision and finality of it, the State would subsidize the private educational institutions.

Attorney

Very severe and pronounced problems would ensue for the future of post-secondary education in the country as free programs would be impeded with the threat of class action telling the university system what to teach. There would be a form of collectivist state doctrine that could spell the end of the free university system as we know it today.

Attorney

Such a decision would turn the higher education system of the country over to private schools as first priority, with public universities delegated a role of providing a higher education only for those unable to gain admission to a private school. It would hamper the expansion of a higher education system.

Education Counsel

8. Suggestions for private universities: lobby for cost equalization of the institution; reorganization to be more responsive to demand

The present approach taken by most private universities in this State is to seek out subsidization in some form from public monies to improve their competitive position with the public university. Such an approach supplemented by imaginative reorganization of institutional structure in terms of on-campus time required to produce graduates could very materially narrow the competitive gap between public amd and private institutions.

State Education Official

Private universities should explore the idea of an eminent domain theory.

Education Counsel

Seek to satisfy the public that its contribution to the educational process is such as to warrant their being supported.

Education Counsel

9. 95% argue that private universities should continue to exist

I do not believe that private universities should or will exist twenty years from now. They have a place at this time only because the State does not have adequate means to educate all. I believe that education shall become free on the post-secondary level in the

future. I also think that it is only right that it should. The direction of our civil rights cases now obviously points to this in the future, since nothing can be more discriminatory than keeping educational opportunities among those who can afford it or to be handed out to certain individuals and not to others on some other arbitrary basis. When a church or a private foundation provides educational facilities, all too often they impose restrictions on the free exercise of the search for truth where such exercise runs counter to popular ideas or religious percepts. The sooner private indoctrination ends and public education begins on a post-secondary level, the better we would serve the basic principles of equality, justice, and the general welfare.

Attorney

Yes, very definitely. A disaster for the State and the country. The only thing wrong with private higher education, especially the liberal arts, is its cost. There is no way the State University system can be immunized from political pressures brought to bear directly through the budgetary process. Independent thought cannot flourish in the presence of such a threat.

University Counsel

Certainly, I think they should exist. We need more elite universities. If they didn't exist, someone would invent the elite university. If they didn't exist, higher education would be incomplete.

Educator

Private universities should continue to exist. If they didn't exist, we would find that public universities may start to mirror too closely to government doctrine and propaganda in certain areas of the curricula.

Education Counsel

10. <u>80% see the event reported here to be threatening to society</u>

I see the event as threatening but believe its occurrence is not within my imagination. To forestall this unlikely event, I would push for more state and federal aid to private institutions.

Attorney

The event is seen as threatening to society in the form presented. The suggestions for subsidization of the student, elimination of unnecessary duplication, and the encouragement of innovative reorganization of institutions are seen as possibilities to forestall the event

while at the same time preserving the private institutions.

State Education Official

I would see the event as mildly threatening to society. To forestall the event, private institutions need to maintain their diversity and stop trying to become public institutions. While public education continues to accommodate an increasing number of college students, private institutions are in no position to attack them. Like the chicken who inadvertently got penned up in a stable with a horse, the private institution should say, "Let's have an agreement not to step on each other's toes."

University Official

1. The public universities should police their own systems and avoid expansion for the mere sake of expansion or empire-building; they should gear their programs to the apparent need, and consider the private schools as a key part of the overall system of higher education. 2. The State should consider establishment of a facility to coordinate the public and private systems of higher education. Private universities should not be compelled to join such a facility, but some provision might be made for financial assistance, within constitutional limits, in some way for those that do. The coordination should avoid the concept of control of the private schools, but rather be aimed at assuring the private schools an appropriate place in the higher education field to guarantee their survival.

Education Counsel

COMMENT

- We have two issues under address: the distribution of pubiic monies for higher education and the rights to the benefits of higher education.

- When we discuss the distribution of public monies for the support of higher education, we tend to think in terms of institutions, schools, systems . . . places and things.

- When we discuss the distribution of public monies for the support of students , we tend to think in terms of loans, scholarships, incentives . . . people and needs.

- But we are really concerned with the distribution of public monies for the support of learning.

- Similarly, when we discuss the rights people have and focus on equal protection, we tend to think if diverse individuals with diverse interests all having a common need to have society assure their equal rights and freedoms.

- When we discuss these rights and focus on equal opportunity, we tend to think of similar individuals with similar skills and similar interests all wanting a common good.

- But when we focus on the concept of equal access, we tend to think of diverse individuals with diverse interests each needing different opportunities equally protected.

- I would assert that the problems now faced in higher education financing might benefit from considerations of alternative concepts. Our time linked rhetoric often precludes certain kinds of dialogue while enhancing or perpetuating others.

- The issue, then, is to see how we might view educational policy differently if our goals were articulated in terms of learning opportunities and equal access, rather than support for higher education and equal opportunity.

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APPENDICES

I. Disaggregate Edited Responses
Pages 33-59

II. List of Respondents
Pages 61-62

III. Future News Events
Examined in this Series to Date
Pages 64-65

Appendix I

DISAGGREGATE EDITED RESPONSES

1. What is the earliest possible date for the case reported here to emerge in a State Court?

The factual predicate for the "Future News Event" and for the judicial determination related in it arguably exists right now--i.e., direct competition; decreasing applications and enrollments in many "private" educational institutions; substantial tuition differentials; and the near bankruptcy of many "private" colleges and universities. Arguable, therefore, by filing an action right now with a court judicially disposed to reach the result set forth in it, the "Future News Event" could emerge today. *(Attorney)*

Several ways could be suggested as a means of appeal of such an order. I believe that appeal of the order, filed with the Court, would stop all proceedings or actions on the part of the respondents, and the matter would then be heard on the Court calendar depending on the jurisdiction concerned.
(Attorney)

Meaning not clear. Appears it already has "emerged" in a State Court. If you mean earliest date a final determination of the issue can be had by Court of Appeal of New York, answer is probably eighteen months to two years.
(Dean Law School)

It could come up on a motion to dismiss within 30 days on the basis that there is no justiciable case. *(Attorney)*

I am very dubious that there is a legal cause of action against the State or the State University for overlapping with private institutions and am not sure that there should be. I prefer the establishment of standards for the activities of the State University by legislation (i.e., a broad mandate to the Regents or the Education Department to establish and enforce such standards). Lawyers and judges are not equipped to decide such issues, and I doubt that any court

would ever venture into the field. Further, the State educational system should not be subject to suits of this nature which could become endless and very expensive. *(University Counsel)*

Your question is not clear. Are you assuming that if the case occurred in New York State that another state would soon have the problem? This type of case could possibly occur in the State of Washington if a New York Court so ruled. State statutes would, of course, have to be similar to those in New York for the exact same type of litigation to occur. In our state it may take one year for this type of case to go through the Court system and for an opinion to be rendered. *(University Counsel)*

1971 . . . if no such case has yet emerged.

(University Official)

There never would be such a case. The time for such a challenge has long since passed. *(Attorney)*

Assuming you mean by "State Court" the appropriate court of appeal, it would be about six months before the case would be ready to be heard, then probably another three to four months for hearing and decision.

(Education Counsel)

This is not considered to be a likely case to occur since the strategies of the private colleges and universities to achieve a competitive position with the public sector point toward requests for support rather than court action.

(State Education Official)

March 1976. *(Educator)*

I am a little uncertain about the wording of this question. The word "emerge" is customarily used in the sense "to depart from." However, it would appear that perhaps in this question it is used in the sense of "appearing in." If this is true, then, of course, such a case could be filed in most states at

any time by any person claiming an interest therein. If by the question an estimate or guess on the part of the answerer is solicited as to the earliest possible date when such a case might be filed in the State Court, then this answerer does not feel qualified to make such an answer to such a question.

(Education Counsel)

There seems to be no basis for such a case at any date in the future since there is not (to my knowledge) any statute or constitutional provision barring the State from any field of activity in competition with private enterprise. Before the State can enter any field, statutory authorization and funding must be legislated, and this action provides a legitimate base. Some actions might be taken by the Executive Branch of the State under its general constitutional powers, but funds for it would have to be authorized if significant in amount.

(Education Counsel)

I seriously doubt such a case would come before the courts of the State of Georgia within the foreseeable future. *(State Education Official)*

2. <u>If you were preparing the plaintiff's case, how might you argue?</u>

The State's primary obligation is to furnish a complete education to all State residents through the secondary schools (12th grade). This obligation has yet to be fulfilled, and until sufficient funds have been furnished to fulfill that obligation, the State cannot divert funds to this purpose.

The post-secondary system denies equal protection to the State's citizens in that enrollment is not open to all; hence, the expenditure is for a limited class and unconstitutional. State funds are spent for the benefit of non-residents to the detriment of residents who: 1) Because of misdirection of funds are not receiving a complete high school education; and 2) Are denied admission to the post-secondary system. While the State might expend funds to train teachers and others for posts in the State service, it has no constitutional right to expend funds for the general post-secondary education for those who will not enter State service or even remain as State residents.

(Attorney)

I would not accept employment as an attorney representing the plaintiff's point of view. I do not believe that education is an exclusive right of the private sector. In fact, I am not sure that I believe that education belongs in the private sector at all--even at post-secondary levels.

(Attorney)

Against: 1) There are limited funds for education purposes and that duplication of education must not be fostered at public expense. 2) Curricula must fit the need and the times and must not overburden the fiscal economy. 3) We might one day have an overtrained society of experts and undertrained society of people who are the workers. Not everyone has the necessary tools and makeup for a career, and there should not be a force-feeding technique that compulsion brings; and the State must not mandate higher education upon every being, and in so doing, usurp private educational capital.

(Attorney)

That while private colleges and universities need competition so do public institutions--and the competition necessary to insure that public and private institutions perform at their best will be wished only if each continues to endure to provide the necessary competition for the other. The State should not be permitted to fund and support public institutions to the extent that the public ones overwhelm the private ones completely. The answer, rather, is to insure the necessary flow of public funds to public and private institutions alike, so that each remains viable and is able to provide competitive services at a price that is not radically different.

(Attorney)

(a) Taking property without due process of law, (b) Equal Protection clause of 14th Amendment. *(Dean Law School)*

If I were arguing the plaintiff's case, I would allege that public officers, in this case a Board of Trustees, owes a fiduciary duty to the taxpayers of this State to exercise its powers within constitutional limits. I would argue that the action of the Board of Trustees was State action constituting "inverse

condemnation." The Board of Trustees is in effect exercising the power of "imminent domain." *(Education Counsel)*

I would prepare the plaintiff's case as if I were preparing arguments to be presented at a legislative hearing. These arguments are:

a. Best quality education, particularly in the liberal arts (humanities, social sciences and natural sciences) is private education. The reasons for this are that private education can be highly selective of the students it teaches, and the faculty can be independent from "mission plans" or "training for immediate social needs" requirements.

b. The basic concepts of private higher education are very different from those of public higher education and while the two may happily complement each other and co-exist, they should not compete unless the private system cannot offer quality education to a significant number of students capable of benefiting from it.

c. The traditions of the State and the nation are to rely primarily upon private energies, especially in the fields of education. Out of three centuries of private education great institutions of excellence have been built which command the envy of the world and should be encouraged rather than discouraged and destroyed.

d. The cost of higher education to the general public can be reduced significantly by the use of private support and existing endowments available to the private institutions.

e. State grants to private higher education are inconsistent if the result is only to have the State supporting two systems doing the same thing. More efficient use of public money is to strengthen a dual system, each in the areas where it performs best.

f. The argument made by Judge Schroeder that the State system needs the private system for comparison is fallacious in its implication that both systems would be doing the same things in all fields and is hereby rejected to that extent.

g. The State is the beneficiary of all forms of education being given to its citizens and should consistently strive to provide the best education for

those of its citizens who wish it. *(University Counsel)*

I would argue that there is no such thing as a private institution of higher education. All receive very substantial public support either in the form of state or federal funds, or in the form of tax exemption. The State has thus recognized de facto the public nature of so-called private institutions. To destroy a private institution is therefore to destroy a public institution. *(University Official)*

That the establishment of State institutions of higher education aimed at providing non-specialized education (non-technical or agricultural) was depriving the plaintiff of property, by setting up a tax-supported institution in unfair competition. *(Educator)*

That preservation of the private institutions of higher learning is vital to the public good. That for many years the State did, in effect, encourage the establishment of private institutions of higher education, by not expanding its own system of higher education beyond the normal demand. That expansion of the public system of higher education jeopardizes the existence of the private schools and thereby threatens the overall public good. Elimination of the private schools would deprive the public system of an important guideline of excellence. *(Education Counsel)*

It is difficult to think about arguging the case for the plaintiff since my thinking is completely contrary to that of the plaintiff. The only possible argument I could use favorably for the plaintiff would be the fact that private institutions are providing services which would reduce costs of public colleges and universities. *(State Education Official)*

The existence of duplicate curricular offerings places an unfair burden on both the private institution and the society at large because of a misallocation of economic resources. The State university system is working toward a monopoly position by subsidized, competitive practices. The government should be providing services only in those areas where the need is not being met by private institutions. *(State Education Official)*

I would contend that the State educational system had exceeded its statutory authority and that the system had abused its powers to such an extent that it could be enjoined. *(Education Counsel)*

3. If you were preparing the defense, how might you argue?

Basically, that education is a public concern. Education by private concerns tends more toward indoctrination rather than education. Nothing is more fundamental to the general welfare of a nation's citizens than the right to education. There is no greater natural resource than the talents and knowledge of its people. If post-secondary education is limited to those who can afford to pay, as could well be the case if only the private sector had the responsibility of education, then we would perpetuate the inequalities and discrimination of 19th Century America into the future. Equality of opportunity, which is stated to be a fundamental goal of our government, cannot be accomplished unless the doors to higher education are available to all. This means that the public must be involved both in subsidies for scholarships, and in the building and maintenance of public universities.

(Attorney)

In providing for the general welfare, the State has the constitutional right to expend funds for higher education. The benefits in taxes paid by graduates would more than offset the costs. The courts have held that competition with the private sector is not a bar to entry of the state into a field, e.g., transit, electric and water utilities, garbage collection, golf courses, airports, parking lots, etc. The State can expend funds even though all of its citizens do not benefit equally. *(Attorney)*

That ample competition to insure a high level of performance exists among different public educational institutions within the same state. Support and concern for the "private" college alternative therefore need not continue. Private colleges already receive a substantial portion of their operating funds from public revenues (grants, etc.), and even with this they have been

unable to withstand the competition of the market place. Private colleges and universities have not evidenced any willingness to accept the public controls which would go with more public funds. Finally, private colleges for the most part are corporations chartered by the State--which fulfilled their charter purpose decades ago, and those purposes no longer are relevant.

(Attorney)

Defense: 1) Never put a stop to programs in education. 2) State dollars are used for the public and do not mean to support private capital at public expense. 3) Public demand is largely subjective and cannot be effectively assessed without study and evaluation of the course offering.

(Attorney)

Would argue: No State peodenta of students on any limitation on State powers.

(Dean Law School)

That education, including higher education, is constitutionally decreed to be a responsibility of the State. That no institution has a vested right in the field of higher education. That all individuals who so desire have a right to attend an institution of higher learning, and if the State does not provide such facilities, then it has not met its responsibilities in this area. That the rights of an individual to an education supersede any rights that a private institution may have by virtue of prior establishment. That the private schools have been unable to meet the demand for higher education. Establishment and expansion of public universities still leaves the private schools with their area of operation. *(Education Counsel)*

Request a statement showing the constitutional or statutory provision which prohibits the State program. Would state the legislative Acts and Budget Authorizations which enabled the program to proceed.

(Education Counsel)

That the State has the power, because it represents the people. That great numbers of young people were deprived of education because they were excluded

from private institutions. That the reason for State institutions is similar to the reason for TVA--a "hardstick." *(Educator)*

It would seem to me that the theories of a plaintiff and a defendant in this type of a case might differ depending upon the law of the state where the suit is commenced. In Michigan under the State Constitution, the general supervision of all public education is vested in the State Board of Education. It serves as the general planning body for all public education and acts as the adviser of the Legislature. Each State institution is governed by a board of control which is autonomous. Therefore, I would contend that the setting of curriculum in a Michigan educational institution was under the ultimate control of its board of control. Therefore, no private educational institution or even the State Legislature would have the right to interfere with the governing and operation of the institution by its board of control.

(Education Counsel)

In arguing for the defense, I would argue that the constituion of the State of Washington dictates that the State provide a public education. Further, that the Public Health Safety and Welfare demand that the certain courses be taught, including those related to the fine arts and less "practical" subject matter. Analogies could be drawn from the postal system, public utilities, public busing, all of which impose somewhat on the free enterprise area.

(Education Counsel)

Education is the right of all citizens of the State and the State directly benefits from education given to its citizens, therefore, the State cannot allow private interest to have the primary voice in establishing educational policy or setting educational standards. Neither parents nor private institutions can be relied upon to perform an adequate educational role. There is no evidence that the State cannot provide the same or better quality education as that provided by private institutions. - Private education will always exist in some form and should "fend for itself," therefore, the State may in effect ignore it and carry on as the State feels is best. - The State is in the

best position to know what type of education is needed by members of society for both the present and the forecasted future and can adapt most rapidly to meet these needs. This close relationship between identified educational needs and providing the necessary educational services is actually the most efficient use of any funds spent on higher education. The private system of higher education is inherentingly wasteful because it lacks unified direction. Support of private education has come to be the subject of great and unpredictable fluctuation and even in certain cases to be highly doubtful of being continued. This gives the lie to private education's claim of excellence. Nor can the past reputations of private higher educational institutions do today's vital job. - Even if private education does continue, it will be the State system which provides the standards of excellence.

(University Counsel)

Since the defense accepts plaintiff's plea of the public nature of "private" institutions, it follows that such institutions are creatures of the State and subject to control of the State. One means of control is to create parallel institutions. The argument is that the State has the power to create and destroy institutions for the convenience and necessity of the public and therefore the private institution has no cause for action.

(University Official)

Although duplicate service was provided, there was a need not being met by the private institutions in that they catered to a certain clientele rather than providing equal opportunity to all segments of society. The less affluent individual, in particular, is less likely to be accepted by the private institution not only because of his inability to pay, but because his communicative and intellective style is likely to be different. Therefore, it is in the public good to insure a complete range of options to the public segment.

(State Education Official)

The defense argument could very well be that State governments, although not directed to provide educational opportunities by the United States Constitution,

have the implied powers to do so. It is the duty and responsibility of State governments to provide for the welfare of their citizens. Therefore, I think State governments should take every measure necessary to furnish those services necessary for the benefit of its citizens. Private institutions are not in position to provide for all the higher educational needs of a State's citizenry. Therefore, the government must assume part of the educational responsibilities. *(State Education Official)*

4. Other causes of action that might arise from the success of this action are . . .?

Further restrictions on activities of the State in the proprietary area.
(Attorney)

The other causes of action that could arise are: (a) Violation of the Civil Rights Act of 1964 by reason of discrimination. (b) Suit for damages against the trustees of Jefferson University for abuse of process. (c) Injunction against the trustees of Jefferson University.
(Attorney)

Demonstrate existence of need that cannot be met by Jefferson because of financial inability to attend. *(Dean Law School)*

Actions against school boards by classes of people which could complain about course offerings, etc. This kind of problem properly belongs in issues for election of board members, or in public representation at public board meetings. Such law suit would seriously hamper and destroy our public education system in favor of competing private groups.
(Attorney)

(1) Action by less wealthy students or their parents for an order requiring admission of such students to private colleges at a price they are able to afford. (2) Action by students or taxpayers requiring State controls to

insure that private college offerings--for which there is no competition--are provided at a high level of competence and performance.

(Attorney)

Cannot answer. *(Educator)*

The success of this action would seem to endanger the eventual control of private institutions. It does not seem possible that governments could remain out of the educational picture for any length of time. Therefore, I believe private institutions would eventually become either semi-public or public institutions. *(State Education Official)*

We might expect similar actions to be taken in the case of the profession of medical services (public versus private hospitals), community colleges, vocational-technical schools, and vocational offerings in high schools since there are competing proprietary institutions. *(State Education Official)*

Vocational schools run by school districts could be in trouble receiving challenges from private barber schools and business colleges.

(Education Counsel)

Prohibition of operation of hospitals, etc., where there is a private enterprise performing comparable work. *(Education Counsel)*

If this type of action is successful, then other State operations could be similarly challenged such as the operation of hospitals, sanitariums, employment agencies and various other types of commissions dealing with services to the public which could also be furnished by private enterprise.

(Education Counsel)

An action for damages for loss of tuition revenues. Actions in related areas wherein government has entered a field pioneered by private interests; for example, the field of social welfare and assistance, in which the churches and the private welfare agencies such as the Red Cross might challenge the

government welfare programs; or in the missionary field, in which the church missions might challenge the Peace Corps program; or, in the field of collegiate athletics, another area pioneered by the private universities and now largely taken over by the public universities.

(Education Counsel)

Suits by State Regents or coordinating boards to control all institutions of higher education, both public and private, and to determine programs to be offered, particularly the addition of new programs to curricula.

(University Official)

. . . too odious to contemplate. Suits to enjoin certain courses or even specific classes, suits to bar the State University from hiring certain faculty, etc. In other words, endless hostility and quarreling.

(University Counsel)

5. What suggestions would you make to the legislature to prevent the action occurring, forestall, or nullify the action?

Make sure that enabling legislation is sufficiently broad to forestall any argument except one upon the ground of unconstitutionality.

(Attorney)

I do not feel that the issue is sufficiently in doubt in this State to require protective legislation. *(Attorney)*

Provide a system of tuition grants to private colleges on a basis of need. In that way, through a higher educational aids board funded through increased aid to private colleges and become eligible for federal grants. Provide a more intensive study by resolution of college curricula to determine justification of funds for courses. *(Attorney)*

(1) More vigorous control by State of private college and university offerings. Leading to a fairly high degree of State control of curriculum of both public

and private institutions. (2) Great deal of discussion of what constitutes unmet need. (3) Pressure to expand aid to private university students so that less need exists; on pressure to increase financial burdens of private institutions so that more need exists. *(Dean Law School)*

Prevent--increase State funds to private colleges; nullify--withdraw charters from private colleges, and make higher education a State function.
(Attorney)

Develop a program for increased support of private education, perhaps by grants to students. Create a "Coordinating Council" to try to reach agreements on the role and function of private vs. public institutions.
(Educator)

The only action I see necessary would possibly be laws enabling State Boards of Regents or Boards of Education to provide those curricula necessary for the successful operation of institutions of higher learning. Since such laws are possibly already on the books in some states, I doubt such actions would be necessary. *(State Education Official)*

Legislation should be provided to grant authority to a regulatory agency for the purpose of requiring the demonstration of need before new programs, courses of study or curricula are introduced in State institutions. The legislature should appropriate funds and provide a legal mandate for the subsidization of students attending private institutions to the degree that the private institution can not compete economically with the public program. Such legislation should include a maximum so that some degree of control could reside in the hands of the determiners of public policy since they do not exercise budgetary control over private institutions. There is considerable precedent for subsidization in the case of transportation, agriculture, exploitation of natural resources, and other activities determined vital to the public good. *(State Education Official)*

State Legislature should declare it to be in the interest of public health safety and welfare that the public supported higher education institutions be allowed to offer any curricula, compatible with the general purpose of offering public education. *(Education Counsel)*

Whenever the Legislature authorizes a program such as the "case" in question, that there be a finding as to the statutory basis under the Constitution. *(Education Counsel)*

While in the State of Michigan and I am sure in other states the governing boards of state institutions of higher learning are autonomous, the financing of the operation of such institutions is dependent to a great extent on legislative appropriations. While the Legislature has no right, at least in Michigan, to interfere with such details as curriculum, it can indicate its disapproval by means of limiting and curtailing appropriations to the institution in question and thus might be able to assert a control not intended to be granted to it by the Constitution. *(Education Counsel)*

Enactment of a provision that the State University, as a government agency, cannot be sued without permission of the State. Limitation of appropriations for State University operation in excess of a specified level. Appropriation of funds to provide the difference in tuition costs between State and private universities, for any student desiring to attend a private university. *(Education Counsel)*

Abolish private institutions since they no longer exist anyway and place all higher education under appropriate State Coordinating Boards. *(University Official)*

The legislature might adopt a policy position that the role of the State University is to complement existing educational services and resources and not to overlap, and then empower the Education Department or the Board of Regents to maintain statistics as to where the private colleges are meeting the demands

and where they are not. Then the policy should be to avoid or make appropriate plans for any large scale efforts on the part of the State University to move into these areas. *(University Counsel)*

6. How might the State act to satisfy the court order?

If the State attempted to satisfy this court order, in my opinion, it would be acting in violation of federal and constitutional law.

(Attorney)

The order would be reversed on appeal; if not, and if the order is in any way based upon inadequate statutory authority, the Legislature should amend.

(Attorney)

On research, work harder to develop a better product and to get State assistance.

(Dean Law School)

Increase demand--by compelling education beyond high school and perhaps requiring such education to be in public institutions. Increase need--foster legislative changes increasing the social need for the kind of education which the State colleges and universities provide. Reduce its number of course offerings. *(Attorney)*

The State would have to order the State University system to evaluate their curriculum and justify causes as to course offerings, attendance and expense. It would then lead to severe curtailment of programs and discrimination in funding. *(Attorney)*

The State should survey course and program offerings to eliminate unnecessary duplication and should require a demonstration of need before authorizing extensions of same. *(State Education Official)*

It is difficult to understand how the State could satisfy the court order without curtailing or abolishing institutions of higher learning.

(State Education Official)

The State should seek to transfer to the private colleges those areas affected by the court decision. It could also announce its new policy of non-competition and counsel anyone inquiring of the State University about the areas affected where he or she might find such areas being served among the private colleges of the State. In the long run, the best solution would be for the State and private universities to enter into a cooperative system where each would contribute what was best of each to the total educational resources of the State. Cornell University offers a model of how private and public systems can work as a harmonious team being extremely mutually supportive.

(University Counsel)

State Legislature could act to require that all curricula be submitted to the public in the form of a referendum. *(Education Counsel)*

Slowly. *(University Official)*

Formulate a plan for the phasing-out of support for non-specialized higher education. *(Educator)*

Of course, the clearest way to satisfy the Court order which was to immediately end any curriculum in competition with private colleges or universities where no real need existed would be to cease offering such a curriculum.

(Education Counsel)

Under this court ruling, the State would have to show in the future that any course offerings in State universities were supplemental to those offered by the private schools, and were offered primarily to meet a demand not fulfilled by the private schools. It would have to set up a special study program to show each year the extent of the demand for higher education, how much of this demand could be met by private schools already in existence, and then gear the public university system to meet the excess demand.

(Education Counsel)

Cannot conceive how such an order to cease offering particular curricula could be sustained. *(Education Counsel)*

7. From your knowledge base, what implications do you see a case of this type having on the future of post-secondary education in this country?

They should, but they will come to resemble public universities more and more. Still the difference is worth preserving for it provides some additional immunity from public opinion that is needed. If they didn't exist, we would get along. *(Dean Law School)*

None. *(Attorney)*

Assuming such a decision and finality of it, the State would subsidize the private educational institutions. *(Attorney)*

Very severe and pronounced problems would ensue for the future of post-secondary education in the country as free programs would be impeded with the threat of class action telling the university system what to teach. There would be a form of collectivist state doctrine that could spell the end of the free university system as we know it today.

(Attorney)

Such a case would fragment higher education--first in time, first in right would prevail as to any type of curriculum or program. It would discourage competition. And it would require finding some way--subsidy or otherwise--to insure that private institutions perform at a high standard and at a price which not only the affluent could afford.

(Attorney)

Possible detrimental consequences might be that the societal and economic fluidity of the population would be further curtailed due to the selective policies of the private institutions as well as their prohibitive cost to some segments of the population. Another consequence may be a reduced opportunity of selection on the part of the students because of the emphasis on course offerings on general demand rather than individual desire. There are some highly specialized, intellectual activities which will rarely present

enough popular demand to win acceptance under such an arrangement; i.e., actuaries, specialists in rare diseases. *(State Education Official)*

Implications would seem to result in complete chaos in post-secondary education in this country. *(State Education Official)*

Termination of the so-called private institutions of higher education. *(University Official)*

While I cannot envision such a case, I appreciate how important would be the recognition of the problem and how important it is to move away from competition to cooperation between State and private systems of higher education. *(University Counsel)*

1. Increase the variety of educational choices and opportunities in higher education. 2. Development of a national policy for support of higher education. *(Educator)*

The future of post-secondary education in this country would tend to become more trade school oriented. There would be a restriction on imaginative liberal arts and social con-erns courses. The result could be drifting toward the "Big Brother" problem foreseen by the boo, Animal Farm. *(Education Counsel)*

Such a decision would turn the higher education system of the country over to private schools as first priority, with public universities delegated a role of providing a higher education only for those unable to gain admission to a private school. It would hamper the expansion of a higher education system. *(Education Counsel)*

I would view the winning of such a case by a private institution against a public education system as being very disruptive of the public post-secondary education. While private institutions might at the time of the trial of the case be offering courses in its curriculum competitive with State institutions,

there could be no guaranty that such courses would be continued to be offered by private institutions and the right of State citizens to benefit from the taking of such curricular courses could be seriously jeopardized.

(Education Counsel)

8. If the case were reversed on appeal, what would you suggest the private universities do?

Spend their money on educating their students rather than wasting it on frivolous lawsuits in an attempt to keep education in private hands.

(Attorney)

I would not like to see the event happen. Biggest single thing that can be done is to bring tuition costs of two types of institutions more in line with one another. *(Dean Law School)*

Private universities should then look to their own campuses for support and examine their program and facilities to see if they are lacking. They could intensify a local and alumni drive for funds and attempt to secure state and federal grants. *(Attorney)*

Seek more State funds and reach agreement as to division of responsibility so there would be less duplication in given fields of specialization.

(Attorney)

Lobby for maximum funds--with minimum controls-- from the State.

(Attorney)

I would suggest that private institutions provide needed services in a manner necessary to gain the complete confidence and support of citizens throughout each state. This would seem to be the most feasible course of action rather than attempting to use the courts to do those things that could be accomplished by the private institutions themselves. *(State Education Official)*

The present approach taken by most private universities in this State is to seek out subsidization in some form from public monies to improve their competitive position with the public university. Such an approach supplemented by imaginative reorganization of institutional structure in terms of on-campus time required to produce graduates could very materially narrow the competitive gap between public and private institutions.

(State Education Official)

Appeal to the Legislature for enactment of a policy statement.

(University Counsel)

Breathe a sigh of relief. *(University Official)*

Private universities should explore the idea of an eminent domain theory.

(Education Counsel)

Call for a general conference of officials and trustees of private universities and public universities, toward working out an area of understanding and operation to protect the roles of both types of schools, on the theory that both are essential to continuation of an excellent system of higher education. There may be specific roles that can be worked out for each sector.

On the theory that each person should have an equal right to attend any university, State funds to equalize the difference in tuition costs, as referred to above, might be made available. This principle is already used by some states, in paying the difference in costs of tuition at medical schools, rather than establishing their own medical school. *(Education Counsel)*

Appeal to the public education system to cooperate so that courses offered by the private institutions and not needed in the public institutions, if such could ever be the case, would not be offered in the public institutions. I feel that the hypothetical case presents a rather impossible situation because the circumstances could differ so much depending upon geographical and economical conditions in different localities. *(Education Counsel)*

Seek to satisfy the public that its contribution to the educational process is such as to warrant their being supported.

(Education Counsel)

Make a higher appeal, if possible. *(Educator)*

9. Do you feel private universities should continue to exist? Would it matter? What would it mean if they didn't?

Private universities should certainly contrive to exist and operate for that in the very essence and nature of our free competitive society where one has freedom of choice in education, the basis from which all goods flow, it would mean a type of state collectent education if they closed their doors.

(Attorney)

I do not believe that private universities should or will exist twenty years from now. They have a place at this time only because the State does not have adequate means to educate all. I believe that education shall become free on the post-secondary level in the future. I also think that it is only right that it should. The direction of our civil rights cases now obviously points to this in the future, since nothing can be more discriminatory than keeping educational opportunities among those who can afford it or to be handed out to certain individuals and not to others on some other arbitrary basis. When a church or a private foundation provides educational facilities, all too often they impose restrictions on the free exercise of the search for truth where such exercise runs counter to popular ideas or religious percepts. The sooner private indoctrination ends and public education begins on a post-secondary level, the better we would serve the basic principles of equality, justice, and the general welfare. *(Attorney)*

In terms of their source of funds, it can be argued that there really are no private universities today. But they are relatively less free from State controls--they do provide competition for excellence with State schools--and insuring diversity and competition makes a good case for continuing private

colleges as a viable alternative. *(Attorney)*

Part 1 and Part 2, yes. Part 3--quality of education would suffer if the State institutions were compelled to lower admissions standards to satisfy demands of all applicants. *(Attorney)*

I do feel private universities should continue to exist. I think it is necessary private and public institutions of higher learning exist in order to provide a proper balance in our total education program. Just as I believe we could not exist with private institutions alone, I do not think we could exist with public institutions alone. The private and public institutions should complement one another rather than attempt to curtail the activities of one another. *(State Education Official)*

The private university should continue to exist because they provide the opportunity for a flexible approach to intellectual life which might be lost in a public university monopoly. The objections stated above refer to the method of continuation of private institutions rather than their desirability. *(State Education Official)*

Private universities and particularly privately supported church related colleges should be encouraged to exist. They are the only institutions which can guarantee parents and students the right to an education of their own religious and/or philosophical persuasion. Public institutions must be kept free of religious, political, or philosophical cant. Catholic institutions should be Catholic, Jewish institutions should be Jewish, Christian institutions should be Christian. They should stop trying to be public institutions and give their clientele the type of education desired. This diversity is important to our pluralistic society. *(University Official)*

Yes, very definitely. A disaster for the State and the country. The only thing wrong with private higher education, especially the liberal arts, is its cost. There is no way the State University system can be immunized from political pressures brought to bear directly through the budgetary process.

Independent thought cannot flourish in the presence of such a threat.

(University Counsel)

Certainly, I think they should exist. We need more elite universities. If they didn't exist, someone would invent the elite university. If they didn't exist, higher education would be incomplete.

(Educator)

By all means. Private universities have pioneered the field of higher education, and their success in this field is now resulting in the increased competition from the public universities. They provide a yardstick of performance that is important to maintaining a high standard in the field of education. They also handle an important portion of the education in this field, and if all should go out of existence, the cost to the public, in providing the necessary expansion of the public universities, would be great.

(Education Counsel)

I feel that private universities should continue to exist for the great benefit of those persons who desire to avail themselves of the services offered by private universities. I believe that the operation of private universities can be more independent than might exist in connection with public universities which, while supposedly free from politics, are very susceptible of being subject to political considerations. Private institutions do offer competition to public institutions and should be beneficial in that respect.

(Education Counsel)

Yes; private universities serve a vital purpose. However, they are in the main supported by private sources to operate on a non-profit basis in order to serve the public welfare, for which statutory arrangement has been authorized. Private universities offer a market place for the freedom of ideas and the perfection of knowledge without the danger of governmental bias or influence (in great measure, at least). *(Education Counsel)*

Private universities should continue to exist. If they didn't exist, we would find that public universities may start to mirror too closely to government doctrine and propaganda in certain areas of the curricula.

(Education Counsel)

10. If you see the event as beneficial to society, what lines of approach might legislators/educators/interested publics do to bring about the occurrence of the benefits sooner than you conjectured above? If you see the event as threatening to society, what lines of approach might be brought to bear to forestall the event?

I see the event as threatening but believe its occurrence is not within my imagination. To forestall this unlikely event, I would push for more state and federal aid to private institutions. *(Attorney)*

We should really stop thinking in terms of "private" and "public" institutions. So-called private schools have brought a standard of excellence--and do have an institutional and social need for continuing their existence. Public schools should teach what private colleges teach--and should be funded so that they can do it better than private schools if they can. Private schools should be funded--with more state monies, if at all possible--but with the fewest controls possible--to insure that alternatives and competition exist.

(Attorney)

I would consider the holding of this case a threat, but, fortunately, I don't consider such holding to be a reasonable possibility in view of modern case law. *(Attorney)*

I see this event as threatening society and to forestall this happening, I would propose continuing evaluation of curricula for justification to taxpayer and legislation and a continued communication between university and public.

(Attorney)

The event is seen as threatening to society in the form presented. The suggestions for subsidization of the student, elimination of unnecessary duplication, and the encouragement of innovative reorganization of institutions are seen as possibilities to forestall the event while at the same time preserving the private institution. *(State Education Official)*

I would see the event as mildly threatening to society. To forestall the event, private institutions need to maintain their diversity and stop trying to become public institutions. While public education continues to accommodate an increasing number of college students, private institutions are in no position to attack them. Like the chicken who inadvertently got penned up in a stable with a horse, the private institution should say, "Let's have an agreement not to step on each other's toes." *(University Official)*

I see the event as somewhat threatening to society and think that the public universities should have wide latitude in curricula while private universities and colleges should be subsidized much the same as agricultural interests. Further, the government should make available special grants to private universities only to carry out social welfare programs and certain scientific research programs. *(Education Counsel)*

It seems to me that the basic concept of this approach is unsound; this is not an issue for judicial determination as yet. The question of where the post-secondary educational activity should be most effectively discharged is a subject for consideration by the Legislative Branch, based on studies and recommendations from the Executive Branch. The need for this type of education and training must be set forth in such a way that the public can appreciate the need for it, and the cost of failing to provide it. It is unlikely that the private sector will ever be able to fully satisfy this need because of the plan for financing it. Such a plan would impose high economic cost upon the beneficiary making it available only to an elite; societal need for a greater volume of such service would compel the State to enter the arena.
(Education Counsel)

1. The public universities should police their own systems and avoid expansion for the mere sake of expansion or empire-building; they should gear their programs to the apparent need, and consider the private schools as a key part of the overall system of higher education. 2. The State should consider establishment of a facility to coordinate the public and private systems of higher education. Private universities should not be compelled to join such a facility, but some provision might be made for financial assistance, within constitutional limits, in some way for those that do. The coordination should avoid the concept of control of the private schools, but rather be aimed at assuring the private schools an appropriate place in the higher education field to guarantee their survival. *(Education Counsel)*

Believing that such an event would be threatening to society, I would suggest that in order to forestall the event, the public should be made more aware of the need for private colleges and universities and the necessity for private support of them in order that they may continue to operate efficiently and effectively. *(Education Counsel)*

I see the event as beneficial. Establish a national policy for support of students to attest the university of their choice. Encourage the establishment of elite institutions. So far as I know, we now have only one (Rockefeller). *(Educator)*

APPENDIX II

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Appendix III

FUTURE NEWS EVENTS EXAMINED IN THIS SERIES TO DATE

#1

LaFayette School Board Guilty of Fraud

November 1970

#2

'Obsoleted' Expert Eligible for Social Security Benefits!
Appeal Filed!!

April 1971

#3

Unequal Student Aid Declared Unconstitutional!!!
Court Decision Will Force Legislative Action

June 1971

#4

*State University Found Negligent!!!
Guilty of Exceeding Statutory Authority

July 1971

* Case reported in this volume.

Excerpt

FUTURE NEWS EVENT

#1

LaFayette School Board Guilty of Fraud

The Supreme Court today refused to hear an appeal from the Third Circuit Court in the case of John Brockman vs. The LaFayette Board of Education.

The case concerned the fact that while Brockman, 19, received a diploma from the LaFayette High School, he could only read at a seventh grade level.

His lawyers argued that the school system thus failed in its obligation to provide him with the learning skills they imply he received by awarding the diploma . . .

November 1970

#2

'Obsoleted' Expert Eligible for Social Security Benefits!
Appeal Filed!!

PHILADELPHIA (SURC) --- The United States District Court in Philadelphia ruled today that John Aerosmith, an unemployed aerospace engineer, is eligible to receive advances, etc., from the social security trust fund.

Attorneys for the government have appealed to the United States Circuit Court of Appeals, and have indicated that, if the decision of the lower court is upheld, they will appeal to the Supreme Court

April 1971

Excerpt

FUTURE NEWS EVENT

#3

Unequal Student Aid Declared Unconstitutional!!!
court decision will force legislative action

ALBANY (SURC) --- A New York State Supreme Court judge in Albany ruled today that the State must support equally all students attending any public or private institution of higher learning in the State. In the ruling, unequal support based upon the institution an individual attends, was declared unconstitutional, and the existing system was charged with creating a classification "which constitutes an invidious discrimination clearly denying equal protection under the law" . . .

June 1971

#4

State University Found Negligent!!!
guilty of exceeding statutory authority

ALBANY (SURC) --- A New York State Supreme Court judge in Albany ruled today that the State University of New York had clearly exceeded its statutory authority under the New York Education Law, by offering curricula in excess of public demand at the expense of private institutions, and that their activities bordered on negligence. Judge S. B. Schroeder's ruling, directed to SUNY's Board of Trustees, ordered an immediate end to any curriculum currently offered which placed the State-supported campuses in direct competition with private colleges and universities where no real need exists . . .

July 1971

WORK IN PROGRESS

1. COMPULSORY ATTENDANCE (if education is a consumer business, can you make a consumer buy in a monopoly system?)

2. HIGHER EDUCATION POLICY AND THE NEW VOTING POPULATION 18-21 (implications for the future--essay and notes)

3. THE METROPOLITAN LEARNING AUTHORITY VS. SUBSUMED INTEREST GROUPS

4. CREDENTIALS AND TESTS AS REFLECTORS OF SKILL POTENTIAL

n. ?

   a. Preparation of a histogram of the legal precedents set in the 1960's for a forecasting base for the mid-1970's.

   b. Preparation of a conjecture handbook available to the law schools of the country.

   c. Preparation of "Future" Moot Courts.

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